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No. 87-1632

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

YONKERS BOARD OF EDUCATION
Petitioner

v.

UNITED STATES OF AMERICA AND
YONKERS BRANCH-NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF OF PETITIONER YONKERS BOARD OF EDUCATION

I.

If the United States is unwilling to endorse the District Court's *legal rationale* for holding the Yonkers Board of Education liable for system-wide school segregation, it should be required to say so. Instead, this reluctant administration continues, as it did before the Court of Appeals, to run and hide behind the existence of discrete "factual findings" that the District Court itself conceded were not sufficient to render the school authorities liable for system-wide segregation.

The issue of "[t]he legal relevance of public housing discrimination to school segregation . . .," App. at 497a, is not one that the Board simply contrived to appeal a decision whose holding, as the United States would have it, rests on some other, fact-specific footing of intentional wrongdoing by school officials. (U.S. Br. at 9.) It is the District Court itself which expressly concluded that "the existence of subsidized housing discrimination in Yonkers *must be accorded legal relevance* in determining whether *school authorities* may be held legally accountable for the segregation of Yonkers public schools." App. at 497a (emphasis added). And it is the District Court, in equally plain

English, which held that "where school officials knowingly adhere to a segregative student assignment policy" — i.e., the neighborhood school policy in widespread use throughout most of the country[1] — "which is consistent with city officials' unlawfully segregative conduct in housing, such a policy cannot, *as a legal matter*, be considered race-neutral." *Ibid.* (emphasis added). Not surprisingly, both the legal and academic communities[2] — as well as the NAACP intervenors in their brief to the Second Circuit[3] — have cited *Yonkers* for precisely this proposition.

Only the United States pretends (for obvious reasons, given the stance of this administration on legal policy questions such as this) that, *without* reference to the issue of housing practices, the District Court in an unexceptional way merely held the school authorities liable for their own actions "on the basis of factual findings." (U.S. Br. at 9.)[4]

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[1]*See, e.g., Keyes* v. *School District No. 1*, 413 U.S. 189, 245-46 (Powell, J., concurring in part and dissenting in part) ("Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education.").

[2]*See Jenkins* v. *Missouri*, 807 F.2d 657, 675, n. 24 (8th Cir. 1986) *(en banc), cert. denied*, 108 S.Ct. 70 (1987) ("On similar facts in *United States* v. *Yonkers Board of Education*, . . . a New York district court imposed an interdistrict remedy based on housing violations."); Days, Book Review, 95 Yale L.J. 1737, 1767 (1986) (Court imposed "liability upon the [Yonkers] *school board* for its failure to take desegregative action to overcome the effects of the city's segregative housing practices, an approach that has been generally eschewed by the courts." (emphasis original.)

[3]Urging affirmance of the District Court's holding against the Board before the Court of Appeals, the NAACP intervenors stated: "[T]he district court properly imputed liability for school segregation to school officials based, in part, upon the segregative housing practices of City officials." Br. of Plaintiffs-Intervenors-Appellees in Court of Appeals at 86.

[4]Significantly, the quotations which the United States employs to summarize the basis of the District Court's holding against the Board are taken almost entirely, not from the District Court opinion, but from that of the Court of Appeals. While the Court of Appeals affirmed the Districts Court's decision "in all respects," App. at 583a, its superficial recitation of the basis of the District Court's holding against the Board is, in many important aspects, both inaccurate and badly overstated.

Indeed, in the hands of the United States, the essence of the District Court's factual findings have simply been turned around. Where the United States asserts that the Board "committed acts of intentional segregation that *caused the racial segregation of its school system*" (U.S. Br. at 11 n. 10) (emphasis added), the District Court itself squarely held, for example, that the "segregated condition of many Southwest Yonkers schools (elementary schools in particular) cannot be similarly traced to affirmative, intentionally segregative changes in attendance zones or student assignment decisions." App. at 485a. Where the United States purports to rely on "the *extensive* factual findings . . . which highlight" the Board's "segregative intent" (U.S. Br. at 11) (emphasis added), the District Court's explicit conclusion was that — taken as a whole — "the record contains substantially less (or no) evidence of many of the classic segregative student assignment techniques . . .." App. at 497a.

Moreover, the District Court noted that it was precisely the *absence* of such record evidence in any significant degree which makes this case "factually distinguishable" from those in which other lower courts have held unconstitutional neighborhood school policies "where discriminatory housing practices had contributed to the racial segregation of the neighborhoods." App. at 497a, 495a (citing *Arthur* v. *Nyquist,* 415 F.Supp. 904 at 968-969 (W.D. N.Y. 1976), *aff'd in part,* 573 F.2d 134 (2d Cir. 1978), *cert. denied,* 439 U.S. 860 (1978); *United States* v. *Texas Education Agency,* 467 F.2d 848 at 863-64 n. 22 (5th Cir. 1972)). Thus, while the United States states that the existence of a conflict between the decision below and repeated decisions of the Sixth and also the Fourth Circuit is "illusory" (U.S. Br. at 11 n. 10), nowhere does the United States explain why the District Court itself was compelled to acknowledge that its own legal conclusion regarding the relevance of the housing-school connection was in apparent conflict "with a series of Sixth Circuit rulings," App. at 496a, and that "[t]he legal relevance of public housing discrimination to school segregation . . . has not been definitely resolved." App. at 497a.

The District Court's resolution of this issue — by definition, a legal question of enormous policy implications for public education — is the *sine qua non* of the decision below.

II.

The United States does, on the other hand, stress that the District Court "found that the Board and the City *worked together* to maintain the segregation of the Yonkers public schools in a manner that rendered the statutory legal separation between them 'an artificial and constitutionally insignificant one.' " (U.S. Br. at 6, quoting App. at 500a) (emphasis added). To this end, the United States points to the District Court's conclusion that "the combination of the *City's housing policies*, the mayoral appointment of Board members and the subsequent inaction of the Board amounted to an interrelated governmental effort to preserve the integrity of 'neighborhood schools' whose racial segregation was governmentally sanctioned and steadfastly maintained." (U.S. Br. at 8, quoting App. at 500a) (emphasis added).

In this respect, the Court's findings of an "interrelationship" between the actions of the Board and the City, notwithstanding the "independent legal status of the two entities," *see* App. at 517a , depends entirely on the legal significance which the Court attributed to the mayor's exercise of a discretionary appointment power. The decision is devoid of any other basis.[5]

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[5]The United States misleadingly cites the testimony of a former mayor (testimony not relied on by the District Court) to the effect that "the City and Board worked together on educational matters as 'one family.' " (U.S. Br. at 8, n. 5). In fact, this testimony referred only to a collaborative effort between the two entities to identify potential and feasible school sites — precisely as New York state law contemplates. Tr. 1251-52.

Nor, contrary to the government's assertion, did the Court make *any* finding that the Board's delayed return of the closed School 4 property for disposition constituted a "[d]eparture from the normal procedural sequence" of *Board* actions. (U.S. Br. at 7, n. 7.) While the Court did made such a finding with respect to the actions of the City in assuring the use of the School 4 site for "luxury-type housing," it made no such finding with respect to the Board's intent. Indeed, the Board's refusal to return the school site to the City was entirely consistent with its identical refusal to return *three other* closed school

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Thus, contrary to plaintiffs' contentions below, the Court could *not* find that either the City Council's budgetary authority *or* the City's statutory involvement with school site selections was "generally accompanied by racially segregative consequences to Yonkers public schools." App. at 521a-22a. Nor could the Court find *any* evidence that Board members permitted themselves to be "dominated" or "controlled" during their terms of office by either the mayor or other City officials. App. at 517a-18a. Indeed, despite the government's assertion that the Board and City "worked together" to maintain school segregation, the District Court expressly found that, on every occasion, the Board *rejected* City requests for school attendance line changes that would have had a segregative effect.[6] App. at 465a-66a. This "consistent refusal" by the Board to implement City-proposed attendance zone changes with a potentially segregative impact, App. at 467a, was, of course, entirely consistent with many of the Court's other findings of "*desegregative* initiatives" by the Board: the closing of the District's only predominately black school in 1954 (three months before *Brown*) and the reassignment of its students to two predominately white schools; the planned openings of new elementary schools in the late 1960s and early 1970s with the intent to *improve* significantly racial balance in the Southwest Yonkers public schools; the conscious attempts "to effectuate modest improvements in racial imbalance" in the context of fiscally-motivated school closings in 1976; and affirmative and aggressive efforts beginning in the late 1960s to recruit minority teachers. *See* App. at 260a, 234a, 242a, 274a, 356a-57a.

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sites to the City during the same period of time, two of which (Schools 3 and 12) were located in *west* Yonkers and none of which was the subject of pending housing proposals.

[6]Similarly, while the City Council has traditionally passed resolutions on a "variety of school-related issues, such as the addition, site selection, construction, opening, closing, and redistricting of schools, the need to arrange bus transportation for students in particular areas, and the timing of Board decision-making," App. at 467a, the Court found that such resolutions "have been given little or no serious consideration by the Board or have been specifically rejected." App. at 468a.

In short, the Court's conclusion of a segregative "interrelationship" between the Board and the City hinges *solely* on the mayoral appointment — as delegated by operation of state law — of Board members who favored adherence to the Board's long-standing neighborhood school policy.[7] The United States simply characterizes the Board's adherence to such a policy as the equivalent of "avoiding desegregation." (U.S. Br. at 6.) The District Court, for its part, similarly regarded the Board's adherence to neighborhood schools as "a segregative student assignment policy which is consistent with city officials' unlawfully segregative conduct in housing [which as such] cannot, as a legal matter, be considered race-neutral." App. at 499a. Yet Congress itself has reflected the Board's identical policy preference for adherence to the neighborhood school system. 20 U.S.C. § 1701.

Finally, whatever inference may be drawn from the *mayor's* intent in appointing to the Board proponents of the neighborhood school system — an extremely sensitive and problematic inquiry at best[8] — the issue, in the last analysis, is whether the *Board* independently was under any legal duty to adopt a desegregation plan and dismantle its traditional neighborhood school system.

In the absence of findings that the Board had committed a "significant number of affirmative acts of intentional segregation in the area of student assignments . . .," App. at 491a-92a, *or* that it had attempted to enhance within the school system the effects

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[7]Contrary to the Court of Appeals' conclusory assertion that the Board's adherence to this policy was "selective," the "consistent element being that deviations [from and] manipulations [of the policy] tended to increase the racial imbalance in the schools" (App. at 689a; *see* U.S. Br. at 9-10), the District Court expressly found that, especially at the elementary level, the Board's adherence to the neighborhood school policy "has generally been consistent." App. at 218a. The Court of Appeals was not free to disregard findings such as this except by application, which it did not employ, of the clearly erroneous standard. The Second Circuit's treatment of the attendance line change between Schools 9 and 12 (App. at 623a-24a) similarly purports to summarize a "finding" which the District Court nowhere made. *See* App. at 227a-28a.

[8]*See Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 (1974).

of existing residential segregation, *or* that it had "worked together" with City officials in accepting proposals for segregative attendance line or other changes, the answer, as a matter of law, is that it was under no such duty. *See, e.g., Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 414 (1977) (refusal to proceed with remedial desegregative measures not a constitutional violation unless school board, based on prior unconstitutional acts, was under a duty to take such action in the first place); *Washington* v. *Seattle School District No. 1,* 458 U.S. 457, 479-80 (1982).

III.

The United States concedes that in considering whether a school system is racially segregated, it is permissible to group together blacks and hispanics — or other minorities — only where there is evidence that "the *school board* [has] discriminated against both groups of students." (U.S. Br. at 12) (emphasis added). This is the indispensible prerequisite under *Keyes* v. *School District No. 1,* 413 U.S. 189, 196-198 (1973).

The opinions of both lower courts fail this test entirely. There are, to repeat, no findings by the District Court, and no record evidence, that *school authorities* in Yonkers discriminated against hispanics.[9] Thus, this is not a proper case, as the government urges, for application of the "two-court rule." (U.S. Br. at 13, citing *Graver Mfg.* v. *Linde Co.,* 336 U.S. 271, 275 (1949)). The issues "of general importance considered here are not contingent upon resolving conflicting testimony," since there are no concurrent findings by the courts below regarding discrimination against

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[9]Indeed, the District Court expressly determined that the Board's vocational admissions practices, for instance, did *not* have a discriminatory impact on hispanics. App. at 329a n. 113 (Hispanics "not similarly represented in disproportionately low numbers."). Moreover, while the government points to the statement of the Court of Appeals that the record includes "evidence of hostility to Hispanics as well as blacks," (U.S. Br. at 12), that reference is wholly unrelated to evidence of *school board* discrimination against hispanics. *See* App. 684a.

hispanics in the school system. *See A. & P. Tea Company* v. *Supermarket Corp.*, 340 U.S. 147, 153 (1950).

In sum, the record is no more devoid, as the government concedes, of "evidence of discrimination against Asians in the Yonkers school system" (U.S. Br. at 12-13, n. 11), than it is of evidence of discrimination against hispanics in the same school system. On this issue, the United States has all but abandoned the field.

CONCLUSION

In this case, a school board which has not engaged in "a significant number of affirmative acts of intentional segregation in the area of student assignments" — a school board which, indeed, has taken numerous *integrative* steps — has nevertheless been held liable for systemwide school segregation. The links which made this holding possible, segregated residential patterns and the differing judicial treatment of various minority groups, are issues of national concern.

The Board of Education's petition for a writ of certiorari should be granted.

Respectfully submitted,

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